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IN THE

Supreme Court of the United States

October Term, 1939.

No. 272.

NATIONAL LICORICE COMPANY,
Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S BRIEF.

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THE COURT PRESS, N. Y. C.

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ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S BRIEF.

Opinions Below.

The opinion of the United States Circuit Court of Appeals for the Second Circuit is reported in 104 Fed. (2nd) 655. It was filed June 12th, 1939, and an order or decree thereon was entered July 6th, 1939. The opinion and order are printed at pages 907 to 917 of the record.

The decision, findings of fact and conclusions of law of the National Labor Relations Board are printed at pages 867 to 894 of the record and its order is printed at pages 894 to 897. Said decision, order, etc., is reported in 7 N. L. R. B. 537.

Jurisdiction.

The jurisdiction of this Court arises under Section 240(a) of the Judicial Code, as amended by the Act of February 13th, 1925, c. 229, Sec. 1, 43 Stat. 938 (U. S. C., Tit. 28, Sec. 347(a)) and Section 10(e) of the National Labor Relations Act.

The petition for a writ of certiorari was filed August 7, 1939 and certiorari was granted October 9, 1939.

Statement of the Case.

The Charge:

Proceedings against petitioner were instituted under the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. A. Secs. 151 *et seq.*) by the filing of a sworn charge under Section 10(b) of said Act by the Bakery and Confectionery Workers International Union of America, Local Union 405, Greater New York and Vicinity (R. 772, 773). The charge was sworn to before a notary public by James Anderson, Vice-President, on August 2, 1937 and filed with the Board on August 13, 1937. As will be shown later, these dates are of especial significance.

The charge alleged, in substance, that petitioner has engaged in and is engaging in unfair labor practices under Section 8, subsections (1), (2) and (5) of said Act* in that petitioner:

> (a) coerced and attempted to coerce its employees into signing individual contracts with it,

* See appendix.

(b) has called meetings and attempted to compel employees to attend said meetings,

(c) has attempted to compel employees to form committees not of their own choosing to bargain collectively with it,

(d) has by threat and intimidation interfered with the formation and administration of the complaining Union,

(e) has refused to bargain collectively with representatives of the employees.

The Board's Complaint:

On October 7, 1937 the National Labor Relations Board (hereinafter referred to as the Board) by Elinore M. Herrick, its Regional Director for the Second Region, issued against petitioner its complaint and notice of hearing before a Trial Examiner (R. 774-782). After a recital of facts concerning the interstate activities of petitioner (R. 775) and the appropriate collective bargaining unit (R. 775, 776), the complaint alleged, in substance, that:

(a) Since July 28, 1937, the Union had been the exclusive representative of petitioner's employees for collective bargaining purposes and that on and after July 29, 1937, petitioner refused to bargain collectively with it (R. 776).

(b) On or about July 16, 1937, petitioner formed and initiated a labor organization and has dominated and interfered with its administration and contributed support to it (R. 777).

(c) On and from July 15, 1937, petitioner, by various threats, warned its employees not to become members of the Union, and made signing of individual contracts a condition of employment (R. 777-778).

(d) On August 2, 1937, because of petitioner's acts, its employees went on strike (R. 778).

(e) The aforesaid acts of petitioner constituted unfair labor practices affecting commerce within the meaning of Section 8, subdivisions (1), (2) and (5) of the Act.

The Petitioner's Answer:

The answer was executed and filed by petitioner on October 13, 1937 and contained appropriate denials of and affirmative defenses to allegations of the complaint (R. 790-798).

The Trial Examiner's Intermediate Report and Petitioner's Exceptions Thereto:

The hearings before the Trial Examiner designated by the Board commenced on October 13, 1937 and ended on October 20, 1937. Thereafter and on February 7, 1938, the Trial Examiner rendered his intermediate report (R. 804-828), which found that the allegations of the complaint had been established, and that petitioner had engaged and was engaging in unfair labor practices within the meaning of Section 8, subdivisions (1), (2) and (5) of the Act. The Conclusions and Recommendations of the Trial Examiner (R. 824-828) are not detailed here, since later they were incorporated practically *in toto* in the Board's order, discussed hereafter.

To the intermediate report petitioner filed a Statement of Exceptions, dated February 17, 1938 (R. 829-836), which analyzed the evidence and the law in the case, and appropriately excepted to each of the Trial Examiner's Rulings, Findings of Fact, Conclusions and Recommendations in so far as they were adverse to the interests of petitioner.

Oral argument before the Board was waived by all parties (R. 841).

The Board's Decision and Order:

On May 31, 1938 the Board issued its decision (R. 867-894) and order (R. 894-897). The order required petitioner to:

> Cease and desist from:
>
> (a) Dominating or interfering with the Collective Bargaining Committee of the National Licorice Company; from recognizing it as representative of any of the employees; from giving effect to contracts with that Committee and individual contracts with its employees; from refusing to bargain collectively with the Union; from interfering with the exercise by employees of their rights as guaranteed by Section 7 of the Act (R. 894-895).
>
> Take the following affirmative action:
>
> (b) Withdraw all recognition from the Collective Bargaining Committee of the National Licorice Company as representative of any employees and completely disestablish it; personally inform, in writing, each member of the Committee and each employee who signed individual contracts of employment that such contracts violate the Act, that employees are released from its obligations and that the company will no longer demand its performance; upon request, bargain with the Union as to rates of pay, wages, hours and other conditions of employment and if an understanding is reached, embody said understanding in an agreement for a definite term to be agreed upon, if requested to do so by said Union; post notices in conspicuous places for

thirty (30) consecutive days that petitioner will cease and desist, as aforesaid, that the Committee is disestablished, and that the individual contracts are void and of no effect; notify the Regional Director, within ten (10) days, what steps have been taken to comply with the order (R. 895-897).

The Enforcement Proceedings:

Petitioner not having complied with the terms of the Board's order as aforesaid, the Board petitioned the Circuit Court of Appeals for the Second Circuit for enforcement thereof pursuant to Section 10(e) of the Act (R. 4-12). Petitioner opposed the application of the Board and after hearing argument and receiving briefs, the Circuit Court, on June 12, 1939, rendered an opinion (R. 907-913) and on July 6, 1939 filed its decree thereon (R. 914-917).

The Circuit Court sustained the Board's order and decreed enforcement thereof except in one respect. Its order or decree (914-917) followed exactly the Board's order both as to phraseology and paragraph numbering, except that in paragraphs 1.(d) and 2.(c) the Court provided that bargaining with the Union by petitioner was conditioned upon said Union being certified by the Board as the representative of the employees following an election.

Certiorari was granted by this Court on October 9, 1939.

The Pertinent Facts:

Petitioner is a New York Corporation with its factory located in the Borough of Brooklyn, City of New York, and is engaged in the busines of manufacturing and selling licorice and related products.

Approximately 140 employees were employed at the Brooklyn plant during the period concerned in this controversy. On August 2, 1937, the employees went out on a strike which lasted until August 25th, 1937, during which interval petitioner stopped all operations (R. 338). There was evidence submitted at the hearing that many employees, not being in sympathy with the strike, tried to resign from the Union and return to work, but were fearful of violence at the hands of the Union (R. 521-524). On August 25th, 1937, the plant reopened and the employees gradually returned to work until by September 20th, 1937, all employees, with the exception of two who never applied for their jobs (R. 340, 568), were taken back regardless of their union membership or union activities (R. 568).

On August 27th, 1937, Walter J. Healey, petitioner's assistant secretary, was requested by a group of employees to confer with them at the Y. M. C. A. (R. 525). He did so and was informed that the employees were resentful of the treatment accorded them by the Union, were desirous of giving up the strike, returning to work and forming their own bargaining organization (R. 526). Healey replied that their jobs were open to them but that before the company could deal with any representatives of employees, such representatives must obtain "the authorization of 51%" (R. 527).

On September 9th, 1937, Healey was informed by the employees that they had elected, from among their number, a bargaining committee of eight persons who desired to present some requests to the company officials (R. 577). Petitioner had taken no part whatever in the formation or selection of this committee which was created solely by the employees themselves,

without suggestion, instigation or influence of the management (R. 579).

Petitioner, however, refused to deal with this committee unless it could supply written proof that it duly represented the employees (R. 576; 725). Bill McCann, one of the committee members, asked Healey for assistance in drawing up a letter or form to that effect. He was referred to Mr. Sanford, petitioner's president, who, on September 9th, 1937, prepared a form of petition for the use of the employees, which, if executed by a majority, would be acceptable as the written proof of authorization insisted upon by petitioner (R. 576).

On September 10th, 1937, the petition which had been drawn by Sanford at McCann's request, was presented to the company's officials, said document having been signed by the eight members of a committee and by 118 of the 140 employees, constituting over 85% of all (R. 579-580). At the hearing conducted by the Board this petition was admitted into evidence without objection as Respondent's Exhibit 10 (R. 866a), and because of its importance to the questions of law involved in this proceeding, is set forth below in full, except that signatures are omitted.

"September 9, 1937.

National Licorice Company,
106 John Street, Brooklyn, N. Y.

Attention: Mr. D. D. Sanford, President

Gentlemen:

We, the undersigned employees of the National Licorice Company, hereby notify you that we have this day elected a committee of our fellow workers, whose signatures are affixed hereto, as

our representatives in collective bargaining with you. We authorize these representatives to enter into and sign a contract with the employer provided it contains substantially the provisions outlined to us by the Management.

You are also notified that the authority given to our fellow workers to represent us in collective bargaining supersedes any authority that any of the undersigned may have given to any other group, organization or individual, and no one except the collective bargaining committee consisting of our fellow workers is authorized to represent us in collective bargaining.

Very truly yours,"

On the same day, September 10th, 1937, the committee, on its own volition, appeared at petitioner's office and conferred with the company's officials for two hours (R. 697) on the terms of the proposed contract. The committee, on behalf of all the employees, requested an increase of wages (R. 581), pay for all holidays (R. 583), establishment of piece-work rates high enough to equal hourly rate earnings (R. 706) and the reduction of the hours of firemen and maintenance men from 54 to 44 (R. 708).

After discussion (R. 583), the committee accepted petitioner's offer of a 5% increase of wages, one week's vacation with pay (R. 582), a reduction of the hours of firemen and maintenance men (R. 708), and the adjustment of piece-work rates and overtime rates (R. 706). The term of the proposed contract was settled at three years (R. 584).

The wage scale, reflecting the 5% increase, was inserted in the contract (R. 852) and such wage scale could not be reduced by the employer until July 10th, 1938, although it could be voluntarily increased

before that time (R. 855). If changes in hours, wages, vacations or working facilities for the year ensuing after July 10th, 1938 could not be satisfactorily settled by agreement, disputes on these points were to be submitted to arbitration (R. 856). Strikes and lockouts were prohibited by the contract (R. 854).

After all differences had been settled, the contract was executed by petitioner with the Committee and with each individual employee who wished to become a party thereto, petitioner making it clear to employees that signing was entirely optional and that continuation of employment was not predicated upon signing the contract (R. 585).

The contracts were distributed to the employees by the Committee, supervisory employees being admonished not to participate under pain of dismissal (R. 588, 589). A large number of contracts, one of which is printed in the record (R. 850-857), were thereupon executed in accordance with the foregoing, but the exact number executed does not appear.

At the hearing, the Board did not produce a single witness to give evidence as to the manner or method in which the employees appended their signatures to the petition of September 9th, 1937, in evidence as Respondent's Exhibit 10 (R. 866a), pursuant to which the employees had repudiated the Union as their bargaining agent and substituted in its place their own Committee of eight fellow workers, nor did it produce a single member of that Committee. Out of petitioner's entire employee body, the Board produced only two witnesses who gave some testimony on the subject of the contracts and each witness testified that they had signed voluntarily and without coercion (R. 376; 766; 380-381).

To the proceedings instituted by the Board, only

petitioner was made a party respondent. Neither the Committee nor any one of the numerous employees holding individual contracts with petitioner were given notice of the proceedings or named as parties or served with any charge, summons, notice, complaint or other process, or granted any opportunity to be heard on matters affecting their interests. Not being parties and not receiving any notice whatever, the Committee and the employees took no part in the hearings before the Trial Examiner which were conducted *ex parte* as to them in every respect.

The facts outlined above constitute all that is material for the consideration of the questions presented. We omit, as irrelevant, the evidence relating to petitioner's dealings with the Union and the bargaining with it on July 29, 1937. Petitioner contended below that the Board and the Circuit Court were bound, as a matter of law, to conclude that at the date of the hearings in October, 1937 the Union was no longer the representative of petitioner's employees, and therefore petitioner should not be ordered to resume bargaining with it. For the same reason it is futile now to discuss the voluminous testimony on the bargaining negotiations with the Union. It is immaterial whether petitioner did or did not bargain collectively with the Union in July, 1937, because prior to the hearings and on September 9, 1937 the employees had repudiated it as their exclusive bargaining agent (R. 866a).

Likewise, we omit as wholly immaterial certain testimony as to other events purporting to have occurred in July, 1937, despite the fact that the Board, in all the prior proceedings herein, has dwelt at great length thereon, for reasons best known to itself. These matters relate to an alleged attempt by peti-

tioner to form a "company union" in July, 1937 which it is conceded by the Board, never materialized (R. 461) (Board's Decision, R. 876), and concerning which the Board made no order.

Statutes and Regulations Involved.

The statutes and regulations involved are set forth in an Appendix, *infra*, pages 57-61.

Questions Presented.

1. Were petitioner's employees necessary parties to, and entitled to notice of the proceedings abrogating and annulling their individual contracts of employment with petitioner?

2. Was the Collective Bargaining Committee of the National Licorice Company, a party to such contracts with petitioner, likewise entitled to notice of said proceedings and the right to be heard thereon?

3. Is the National Labor Relations Board, as an administrative agency of the United States, bound by the statements made upon the hearing by the attorneys for the Union and the Board respectively, that the charge filed against petitioner did not apply to these contracts and that the complaint did not embody them, or could the Board repudiate such statements of counsel and cancel the contracts notwithstanding?

4. Does the National Labor Relations Act confer upon the Board the power, either express or implied, to cancel and destroy an individual contract of employment?

(a) If the Board has such power over individual contracts of employment, may it be exercised despite the fact that in this case not a single employee whose contract was rescinded has requested such result, given his consent thereto, tendered back the benefits received, or even testified on that subject?

(b) Did the Board, in cancelling the contracts in this case, deprive petitioner and its employees of property without due process of law within the meaning of the Fifth Amendment?

5. Can a contract between employer and employee be said to be "in violation of the National Labor Relations Act" or "unlawful", as the Board and the Court below characterized the contracts in this case, when the Act contains no provisions which affect or restrict, in the slightest degree, the common law rights of persons to contract for the sale of their labor on whatever terms they may voluntarily choose, and this Court, in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45, 57 S. Ct. 615, 628, interpreted said Act as not precluding such individual contracts as an employer might elect to make directly with individual employees or from hiring individuals on whatever terms he may, by unilateral action, determine?

6. Are the terms of the contracts in violation of the National Labor Relations Act?

7. Is the jurisdiction of the Board limited to the hearing and determination of only such unfair labor practices as are embodied within a charge, as provided by Section 10(b) of the Act and Article II, Sections 1, 2, 3, 4, 5 and 9 of the Rules and Regulations of the Board, Series 1, as amended, or does the

Board have power to conduct a hearing and make an order respecting unfair labor practices not charged?

8. Whether the Board made findings on substantial evidence when it gave no heed or effect to the written petition of a large majority of the workers revoking the authority of the Union to represent them and designating their own Committee, when there is no proof whatever in the record impeaching the petition in the slightest degree or of even an attempt to challenge its authenticity or validity?

9. Whether the Circuit Court of Appeals made a proper order in directing petitioner to bargain collectively with the Bakery and Confectioners Union, depending upon the result of an election to be conducted by the Board.

Specification of Errors.

The Circuit Court of Appeals erred:

(1) In refusing to find and hold that the jurisdiction of the Board is limited to the hearing and determination only of such unfair labor practices as are alleged in a charge, and that the Board cannot adjudicate with respect to matters not so charged.

(2) In ordering the disestablishment of the Committee and the cancellation of the contracts when the existence of neither of these matters had ever been charged against petitioner as unfair labor practices.

(3) In not finding and holding that the Committee and each of the employees whose contracts were destroyed by the Board's order were necessary and

indispensable parties to, and were entitled to notice of the proceedings and the right to be heard thereon.

(4) In not finding and holding that the Board lacked power or authority to cancel individual contracts of employment, and that under the circumstances existing in this case a cancellation would result in petitioner, its employees, and the Committee being deprived of property without due process of law.

(5) In holding that "the situation was clearly within *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 58 S. Ct. 571, 82 L. Ed. 831, 115 A. L. R. 307, and not within *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 231-239, 59 S. Ct. 206, 83 L. Ed. * * *."

(6) In holding that petitioner, through the contract, was "exacting unlawful concessions" from the Committee.

(7) In not finding and holding that the statement and concession of the attorneys for the Board and the Union, made at the hearing to the effect that the contracts were not in issue, was binding upon the Board so as to preclude it from making any order or adjudication respecting such contracts.

(8) In ordering the contracts between petitioner, the Committee and individual employees to be cancelled and set aside.

(9) In ordering petitioner, depending upon the result of an election to be conducted by the Board, to bargain collectively with the Union, in view of the

uncontroverted evidence in the record that such Union, as far back as September 9, 1937, was repudiated by the workers and its authority as bargaining agent revoked by the written instrument in evidence as Respondent's Exhibit 10 (R. 866a).

(10) In failing to find and hold that the Board's order was not based upon substantial evidence and that said order was, in all respects, improper and unlawful.

Summary of Argument.

I.

The Board lacked jurisdiction to issue a complaint, hold a hearing or make any order cancelling the contracts or disestablishing the Committee for the reason no charge of unfair labor practice respecting same was ever made. The charge in this case, dated August 2nd, 1937, was filed with the Board on August 13, 1937 and concededly neither the Committee nor the contracts came into existence until September, 1937. Section 10(b) of the Act, and the Regulations of the Board require, as a condition precedent to the Board's power to act, the existence of a charge of unfair labor practices.

II.

The cancellation of the contracts was improper for the following reasons:

(a) The Board does not possess the power to cancel individual contracts of employment. *Jones & Laughlin Steel Corp.* v. *National Labor Relations Board*,

301 U. S. 1, 45; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 235.

(b) Neither the Committee nor the individual employees, as parties to the contracts received any notice or hearing of the proceedings. Under well-settled principles, they could not be deprived of their valuable and substantial rights in a proceeding conducted *ex parte* as to them. *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 233; *Barney* v. *Baltimore*, 73 U. S. 825, 6 Wall. 280, 284; *Mallow* v. *Hinde*, 12 Wheat. 193, 198; *Gregory* v. *Stetson*, 133 U. S. 579; *Shields* v. *Barrow*, 17 How. 130, 140; *Employers Reinsurance Corp.* v. *Bryant*, 299 U. S. 374, 381; 21 Corpus Juris, Equity, pages 273, 277, 282.

(c) The terms of the contracts do not violate the National Labor Relations Act: The objections made by both the Board and the Circuit Court of Appeals have no merit when examined in the light of the reports of Congressional Committees, the specific provisions of the Act and the interpretations placed thereon by this Court in *Jones & Laughlin Steel Corp.* v. *National Labor Relations Board*, 301 U. S. 1 and *The Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 132.

(d) The contracts were not void because of the circumstances attending their inception. There was not even a scintilla of evidence to support the Board's finding of coercion practiced upon employees.

(e) The contracts are not in violation of any policy of the Act or of any national public policy, since their terms are neither prohibited by the Act nor in-

jurious to the interests of the public. *Hartford Fire Ins. Co.* v. *Chicago, M. & St. P. R. Co.*, 20 Sup. Ct. 33, 175 U. S. 91, 106, 44 L. Ed. 84; *Baltimore & O. S. W. R. Co.* v. *Voight*, 20 Sup. Ct. 385, 387, 176 U. S. 498, 505, 44 L. Ed. 560; *Southern Ry. Co.* v. *Blunt & Ward*, 155 Fed. 496, 497; *U. S. Trans-Missouri Freight Ass'n*, 58 Fed. 69, 7 C. C. A. 15, 24 L. R. A. 73; *Swann* v. *Swann*, 21 Fed. 299. No rights guaranteed by Section 7 of the Act are waived by the employees under the contracts, although the benefits conferred by that section, being permissive and not mandatory, may be voluntarily waived by employees without violating any concept of public policy. *Sentenis* v. *Ladew*, 140 N. Y. 463, 466; 67 Corpus Juris 307, sec. 8.

(f) The attorneys for both the Board and the Union, during the course of the hearings before the Board, conceded that the validity of the contracts was not in issue, and the Board was bound by this concession. *Morgan* v. *U. S.*, 304 U. S. 1, 22; *Oscanyan* v. *Winchester Repeating Arms Co.*, 103 U. S. 261; *Shanley, et al.* v. *Bowers* (C. C. A. 2nd), 81 Fed. (2nd) 13, 16.

(g) Petitioner did not, under Section 10(e) of the Act, lose the right to interpose the objection of lack of notice to the Committee and the employees. The objection was seasonably urged by petitioner in its memorandum to the Trial Examiner, an agent of the Board, and in petitioner's exceptions to his Intermediate Report. Petitioner is not precluded from urging this objection under the principle of *Virginia Railway Co.* v. *System Federation No. 40*, 300 U. S. 515, 518, since the failure to give notice or hearing to other indispensable parties causes a direct injury

to petitioner. The controversy was left in an unsettled state in that the nullification of the contracts was ineffective against the other parties (*Barney* v. *Baltimore*, 73 U. S. 825, 6 Wall. 280, 285), who may yet seek enforcement thereof or damages against petitioner despite the Board's order. In any event, the absence of indispensable parties caused a failure of jurisdiction and the point may be raised by the Court *sua sponte*. *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199, 235.

III.

The Board's order disestablishing the Committee was not supported by substantial evidence. *Washington, Virginia & Maryland Coach Co.* v. *National Labor Relations Board*, 301 U. S. 142, 147; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 229; *National Labor Relations Board* v. *Columbian Enameling and Stamping Co. Inc.*, 306 U. S. 292, 299, 300; *National Labor Relations Board* v. *A. S. Abell Co.*, 97 Fed. (2nd) 951 (C. C. A. 4th); *National Labor Relations Board* v. *Lion Shoe Company*, 97 Fed. (2nd) 448, 454 (C. C. A. 1st); *Ballston Still-Water Co.* v. *National Labor Relations Board*, 98 Fed. (2nd) 758 (C. C. A. 2nd).

It was improper for the Circuit Court to order petitioner, depending upon the result of an election, to bargain with the Bakery and Confectionery Workers Union, since the employees had specifically ousted that Union as their bargaining representative by a written petition dated September 9, 1937. *Chesapeake & Ohio R. R. Co.* v. *Martin*, 283 U. S. 209; *Lomer* v. *Meeker*, 25 N. Y. 361.

Argument.

POINT I.

The Board had no jurisdiction to make findings of unfair labor practices against petitioner under Sections 8(1) and 8(2) of the Act in the absence of a proper charge.

Section 10(b) of the Act provides in part as follows:

> "*Whenever it is charged* that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint *stating the charges in that respect*, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. * * *" (Italics ours.)

Under the Rules and Regulations of the Board, Series 1, as amended, in Article II, Section 1, it is provided, in substance, that a charge of unfair labor practices may be made by any person or labor organization; such charge may be withdrawn only with the consent of the Regional Director with whom it was filed or of the Board, and upon the withdrawal of any charge the Regional Director shall dismiss any complaint based thereon. Section 2 provides that the charge shall be filed in the Region where the alleged unfair labor practice has occurred or is occurring. Section 3 provides that the charge must be in writing, the original being signed and sworn to, and that there shall be three additional copies of

such charge filed. Section 4 provides that the charge shall contain the name and address of the person or labor organization making the charge, the name and address of the respondent, and a clear and concise statement of the facts constituting the alleged unfair labor practice. Section 5 states that after a charge has been filed, if it appears proper to the Regional Director, he shall issue a formal complaint in the name of the Board *stating the charges*, together with a notice of hearing, and that *a copy of the charge shall be annexed to the complaint*. Section 9 provides that if, after the filing of a charge, the Regional Director declines to issue a complaint, such action may be reviewed by the Board in Washington.

The full text of the Regulations referred to is set forth in the appendix.

Construing Section 10(b) of the Act and the Regulations, the Circuit Court of Appeals for the Second Circuit in *National Labor Relations Board* v. *Hopwood Retinning Co. Inc.*, 98 Fed. (2d) 97, 101 (C. C. A. 2nd), held:

> "This procedure is required as a prerequisite to the jurisdiction of the Board, and the complaint issued and the subsequent hearing must be in accord with the charge in an attempt to prove or rebut such charges. The Board should be an impartial administrator and must ascertain if there were unfair labor practices as charged. The Board cannot use its own initiative in respect to charging unfair labor practices."

It is apparent from the foregoing that the foundation of every proceeding before the Board for the prevention of unfair labor practices is the charge, and that the Board's complaint, the hearing thereafter held, and any order thereafter issued may not expand or enlarge the charge but that such complaint,

hearing and order are limited and confined to specific unfair labor practices alleged in the charge. If the Board acts with respect to unfair labor practices not charged, such action is necessarily beyond its authority.

In this case, the amended charge was executed on August 2, 1937 (R. 772) and was filed with the Board on August 13, 1937 (R. 868, 869). No other, further or additional charges were ever filed, nor was the charge of August 2, 1937 ever amended. The Board's complaint to a certain extent reflected the allegations of that charge and alleged the commission of various acts purporting to be unfair labor practices, such as petitioner's refusal to bargain with the Union on *July 29, 1937* and thereafter (R. 776); the unlawful formation of a labor organization on *July 16, 1937* (R. 777); and, commencing with *July 15, 1937*, the commission of other acts violative of employees' rights under the Act (R. 777). The complaint, likewise, was never amended.

Yet the astounding fact remains that the Board's decision and order, when finally issued on May 31, 1938, found that petitioner had committed unfair labor practices that had never been charged against it! The order directed petitioner to disestablish the labor organization known as the Collective Bargaining Committee of the National Licorice Company (R. 895) although admittedly that Committee had no existence prior to September 9, 1937 (R. 881), and directed the cancellation of contracts that admittedly were first negotiated on September 10, 1937 (R. 581) and then signed on that and subsequent days (R. 582, 583, 850).*

* The Board's brief in opposition to certiorari at page 29 concedes that "the charge in this case was filed before the Committee had been formed and long before the contracts were entered into."

Obviously, the charge of August 2, 1937 could not include within its scope practices alleged to be unfair when such practices had not yet occurred, nor could the Board's complaint enlarge the charge by specifying an unfair labor practice not originally charged. *National Labor Relations Board* v. *Hopwood Retinning Co. Inc.*, 98 Fed. (2nd) 97, 101.

The intention of Congress in the enactment of Section 10(b) of the Act is clear. The Board cannot act until a charge is made, and only then may it issue a complaint "stating the charges in that respect". By these words of limitation Congress denied to the Board a roving commission. It may not itself initiate charges nor can it complain against that which is not charged. Section 3 of Art. II of the Regulations follows the mandate of the Statute, by providing that the Board's complaint shall state "the charges".

Adherence to proper procedure cannot interfere with the efficient exercise of the Board's functions. The charge need not be particularized nor include evidentiary matter that normally is elicited upon a hearing. Amendments thereto are not prohibited, and, likewise, the complaint may be amended at any time prior to the issuance of an order. Section 10(b) of the Act. Within the general limits of the charge, the Board's order may be adapted to the situation disclosed by the evidence. The sole requisite under Section 10(b) is a charge that "a person has engaged in or is engaging in any such unfair labor practice" (listed in Section 8), which while easy of compliance, yet affords to the employer the protection granted by Congress of ascertainable limits to the scope of the proceeding against him.

The Circuit Court disposed of petitioner's contentions on this point by stating that "here no charge

could have included the company union and it was not necessary that it should" and that "the Board was within its powers in treating the whole sequence as one" (R. 913), a statement which is manifestly erroneous in view of the Statute, the Regulations and the principle enunciated in *Labor Board* v. *Hopwood Retinning Co. Inc.*, 98 Fed. (2nd) 97, 101.

POINT II.

The cancellation of petitioner's contracts with the Committee and with individual employees was improper.

The contracts involved here are tripartite instruments between petitioner, the Committee and numerous individual employees. The Board held that these agreements were individual contracts of employment with petitioner (Board's Decision, R. 895, 896). This is correct as to each employee, but the presence of the Committee as a party and the provisions governing its rights and duties establish also a collective agreement made with a representative of a class.

The Board's Lack of Power to Void Employment Contracts:

We appreciate that the Fifth Amendment, like the Fourteenth, "is not a guarantee of untrammeled freedom of action and of contract", and that "in the exercise of its power to regulate commerce, Congress can subject both to restraints not shown to be unreasonable". Congress has provided in the Act that if men strike in connection with a current labor dispute, they nevertheless remain employees, and that discharged employees may be reinstated. These are reasonable regulations imposed upon contractual re-

lationships well within the Congressional power. *National Labor Relations Board* v. *Mackay Radio & Telegraph Company*, 304 U. S. 333, 347.

But it is another thing to say that the Act may be construed to confer upon the Board the authority to wholly extinguish contractual relationships. The Board's general authority conferred by Section 10(c)*, to require such affirmative action as will "effectuate the policies of the Act" is broad but it is not unlimited. *Labor Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, 257.

In *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 235, this Court held:

> "Further, the Act gives no express authority to the Board to invalidate contracts with independent labor organizations. That authority, if it exists, must rest upon the provisions of Section 10(c). That section authorizes the Board, when it has found the employer guilty of unfair labor practices, to require him to desist from such practices 'and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act'. We think that this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor

* Sec. 10(c). * * * If upon all the testimony taken the Board shall be of the opinion that any person has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order."

"The power to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act: The continued existence of a company union established by unfair labor practices or of a union dominated by the employer is a consequence or violation of the Act whose continuance thwarts the purposes of the Act and renders ineffective any order restraining the unfair practices. Compare *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, supra.* Here, there is no basis for a finding that the contracts with the Brotherhood and its locals were a consequence of the unfair labor practices found by the Board or that these contracts in themselves thwart any policy of the Act or that their cancellation would in any way make the order to cease the specified practices any more effective."

It requires no great discernment to see that if the Board may destroy private contracts when in its opinion the policies of the Act would thereby be effectuated, under the same purported grant of authority it may likewise extend its dominion over labor relations without any limitation or restraint—to the adjustment of wage rates, hours of employment and working conditions—if in its opinion to do so would remove a source of industrial strife and thus effectuate the policies of the Act. The mere statement of the proposition demonstrates its absurdity. We submit, therefore, that the Board was never intended by Congress to have the right to condemn contracts of em-

ployment (*Consolidated Edison Co.* case, *supra*), and this conclusion is fortified by the ruling of the Chief Justice in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45, that "the Act does not preclude such individual contracts as an employer might elect to make directly with employees."

To the same effect see:

National Labor Relations Board v. *The Sands Mfg. Co.*, 306 U. S. 332, 345;

National Labor Relations Board v. *Delaware-New Jersey Ferry Co.*, 90 Fed. (2nd) 520 (C. C. A. 3rd) certiorari denied 302 U. S. 738.

The Failure to Give Notice to the Committee or the Employees:

Petitioner contended before the Circuit Court that the Committee and each employee party to the contract were indispensable parties to the proceedings and entitled to legal notice thereof in view of the invalidation of their contracts. Nevertheless, the opinion of the Court is silent on this fundamental question, except insofar as the Court held "the situation was within the *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 58 S. Ct. 571, 82 L. Ed. 831, 115 A. L. R. 307, and not within *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 231-239, 59 S. Ct. 206, 83 L. Ed. , and the company union could be displaced without being made a party" (R. 912), a statement which demonstrates beyond doubt that the Court below misapprehended the basic nature of petitioner's contention.

Petitioner did not claim in the Circuit Court, and does not claim now that a labor organization dominated by the employer is entitled to notice of the proceedings which culminate in the employer being required to cease recognizing or supporting it. The rule to the contrary was announced by this Court in *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 271. But in that case no question of contract was involved, and later the application of that rule in a case involving contract rights was forbidden. *Consolidated Edison Co.* v. *Labor Board*, 305 U. S. 197, 233. The Circuit Court, however, treated all petitioner's arguments on the subject of lack of notice as though applicable only to the disestablishment of the Committee as a bargaining organization, and, in its opinion, made no reference to the rights of the Committee and the employees to notice and hearing in so far as their contracts were involved.

Here we have a contract executed with the Committee, and with employees who executed individual counterparts of such contracts. The benefits received by the employees under the contracts, such as the maintenance of an irreducible wage scale, vacations with pay, extra compensation for overtime, arbitration of disputes and the prohibition of strikes and lock-outs, are substantial property rights which are personal to each employee and may be individually enforced by him and by the Committee as well.

That the Committee and the employees were entitled to legal notice and hearing and were indispensable parties to the proceeding was settled definitely by the ruling of this Court in the *Consolidated*

Edison case (305 U. S. 197, 232, 59 S. Ct. 206, 218), as follows:

> "The Brotherhood and its locals contend that they were indispensable parties and that in the absence of legal notice to them or their appearance, the Board had no authority to invalidate the contracts. The Board contests this position, invoking our decision in *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261. That case, however, is not apposite, as there no question of contract between employer and employee was involved. The Board had found upon evidence that the employer had created and fostered the labor organization in question and dominated its administration in violation of Section 8(2). The statement that the 'Association' so formed and controlled was not entitled to notice and hearing, was made in that relation. Id., pp. 262, 270, 271. It has no application to independent labor unions such as those before us. We think that the Brotherhood and its locals having valuable and beneficial interests in the contracts were entitled to notice and hearing before they could be set aside. *Russell* v. *Clark's Executors*, 7 Cranch 69, 96; *Mallow* v. *Hinde*, 12 Wheat. 193, 198; *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199, 235; *Garzot* v. *de Rubio*, 209 U. S. 283, 297; *General Investment Co.* v. *Lake Shore Railway Co.*, 260 U. S. 261, 285. The rule, which was applied in cases cited to suits in equity, is not of a technical character but rests upon the plainest principle of justice, equally applicable here. See *Mallow* v. *Hinde*, *supra*."

The Board may attempt to distinguish the *Consolidated Edison* case by pointing out that there the

labor organization involved was found by it not to be dominated or controlled by the company, whereas in this case the reverse is true. But this Court did not say that a company-dominated union is not entitled to legal notice and hearing when that union also possesses contract rights. The basis of the ruling in the *Pennsylvania Greyhound* case was that the order did not run against the company union and its presence was not necessary for appropriate action by the Board. That reason, under the principle of the *Consolidated Edison* case and other authoritative cases cannot govern a situation where the property rights of all parties to a contract are terminated by the Board's order.

If, however, this Court will decide that notice to the labor organization, under such circumstances need not be given, clearly the status of individual employee parties to the contracts is entirely different. Unquestionably, under the rule in the *Consolidated Edison* case each employee is entitled to notice and the right to a hearing, despite the disability under which his bargaining representative may suffer. Such disability of company control, if it should exist, cannot deprive employees, who themselves are under no such disability, of the constitutional right to notice and hearing of proceedings vitally affecting their interests.

In *Shields* v. *Barrow*, 17 How. 130, 140, this Court said in reference to persons who not only have an interest in the controversy but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a state that its final termination

may be wholly inconsistent with equity and good conscience:

> "A bill to rescind a contract affords an example of this kind. For, if only a part of those interested in the contract are before the court, a decree of recission must either destroy the rights of those who are absent, or leave the contract in full force as respects them; while it is set aside and the contracting parties restored to their former condition as to the others. We do not say that no case can arise in which this may be done; but it must be a case in which the rights of those before the Court are completely separable from the rights of those absent, otherwise the latter are indispensable parties."

At page 141:

> "* * * the circuit court can make no decree affecting the rights of an absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person, that complete and final justice cannot be done between the parties to the suit without affecting those rights. To use the language of this court in *Elmendorf* v. *Taylor*, 10 Wh. 167: 'If the case may be completely decided, as between the litigant parties, the circumstances that an interest exists in some other person, whom the process of the court cannot reach—as if such party be a resident of another state—ought not to prevent a decree upon the merits. But if the case cannot be thus completely decided, the court should make no decree.'"

In *Barney* v. *Baltimore*, 73 U. S. 825, 6 Wall. 280, 284, the Court held:

> "There is a class of persons having such rela-

tions to the matter in controversy, merely formal or otherwise, that while they may be called proper parties, the court will take no account of the omission to make them parties. There is another class of persons whose relations to the suit are such, that if their interest and their absence are formally brought to the attention of the Court, it will require them to be made parties if within its jurisdiction before deciding the case. But if this cannot be done, it will proceed to administer such relief as may be in its power, between the parties before it. And there is a third class, whose interests in the subject-matter of the suit, and in the relief sought, are so bound up with that of the other parties, that their legal presence as parties to the proceeding is an absolute necessity, without which the court cannot proceed. In such cases the court refuses to entertain the suit, when these parties cannot be subjected to its jurisdiction."

In *Mallow* v. *Hinde*, 12 Wheat. 193, 198, the Court said:

"In this case, the complainants have no rights separable from and independent of, the rights of persons not made parties. The rights of those not before the court lie at the very foundation of the claim of right by the plaintiffs, and a final decision cannot be made between the parties litigant without directly affecting and prejudicing the rights of others not made parties.

"We do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must apply to all courts of equity, whatever may be their structure as to jurisdiction. We put it on the ground that no court can adjudicate directly upon a person's right, without

the party being actually or constructively before the court."

To the same effect see:

Gregory v. *Stetson*, 133 U. S. 579;
Employers Reinsurance Corp. v. *Bryant*, 299 U. S. 374, 381;
21 Corpus Juris, Equity, pages 273, 277, 282.

The Terms of the Contract Do Not Violate the Act:

The Board and the Circuit Court, while criticizing only a small portion of the agreement, ordered that the whole thereof be discarded. The part attacked is contained in the following paragraph (R. 854, 855):

"SEVENTH: Any Employee has the right to join any union of his own choosing or to refrain from joining any union. The Employees or any of them shall not and have not the right to demand a closed shop or a signed agreement by his Employer with any union. This does not in any way restrain the Employees from having a union representing them or advising them in collective bargaining, and the Employer has the absolute and unqualified right to hire or discharge any Employee or Employees for any reason and regardless of his or their affiliation or non-affiliation with any union. It is mutually understood and agreed that the Employer will not discharge Employees because of legitimate union activities conducted outside of company time or company property or because of affiliation with any union. It is further mutually agreed and understood that the collective bargaining committee or the Employees will not intimidate or

coerce employees and also will not solicit membership in any union on corporation time or plant property.

"A discharged Employee may submit to the Employer facts indicating that his discharge was unreasonable, and the Employer may at its discretion reinstate said Employee, it being the intention of the Employer that Employees be not unjustly discharged. It is strictly understood and agreed, however, that the question as to the propriety of an Employee's discharge is in no event to be one for arbitration or mediation and that any action of reinstatement, if any, will be taken voluntarily by the Employer if it deems such reinstatement advisable."

In the prior proceedings and in opposition to certiorari, the Board maintained that the provision that the propriety of an employee's discharge was not to be arbitrated or mediated and that reinstatement depended only upon the voluntary action of the employer was unlawful because the employee not only is precluded from raising through his representatives the reason for his discharge, but is also forced to accept the decision of petitioner on that question".

That petitioner's absolute right to decide questions of discharge is not infringed by the Act is well settled by decisions of this Court. In *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45, it was held:

"The Act does not interfere with the normal exercise of the right of the employer to select its employees *or to discharge them.*" (Italics ours.)

In *The Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 132, the Court held:

> "The Act permits a discharge for any reason other than union activity or agitation for collective bargaining with employees."

Furthermore, there is nothing in the Act, nor any principle of common law, which requires an employer to mediate or arbitrate a question of discharge with representatives of employees.* Indeed, the particular provision under discussion gave nothing more to the employer than it already had under common law. It was inserted, no doubt, to make clear that the employer's inherent right of discharge was to remain unimpaired, and that the arbitration clauses were not, by implication or construction, to extend to the subject of discharges.

In addition, the Board denounces the provision in paragraph "Seventh" of the contract whereby the employees waived a closed shop and a signed agreement with any union. This, said the Board on certiorari, destroys the "inducement to union membership" and interferes with "the development of genuine union organization". By these words the Board inferentially makes a distinction between na-

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* Report (No. 573) of Senate Committee on Education and Labor, May 2, 1935, 74th Cong. First Sess., p. 2:

> "Prudence forbids any attempt by the Government to remove all the causes of labor disputes. Disputes about wages, hours of work, and other working conditions should continue to be resolved by the play of competitive forces, so far as the provisions of codes of fair competition are not controlling. This bill in no respect regulates or even provides for supervision of wages of hours, *nor does it establish any form of compulsory arbitration.*" (Italics ours.)

tional labor unions and independent plant unions, to the disparagement of the latter. But a union limited to the employees of a single employer is as legal as any other. *Ballston Still-Water Co.* v. *Labor Board*, 98 Fed. (2nd) 758, 762 (C. C. A. 2nd). At any rate, the criterion of illegality is the Act, not the fanciful conclusions the Board may choose to draw as to the ultimate effect of any provision of the contract. And there is no hint in the Act of any requirement for either a closed shop or a signed agreement with a union.

> "In other words, the bill does nothing to facilitate closed-shop agreements or to make them legal in any state where they may be illegal; * * *"
>
> *Report No. 573 Senate Committee on Education and Labor, May 2, 1935, 74th Cong., First Sess., page 11.*

> "The act does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent the employer 'refusing to make a collective contract and hiring individuals on whatever terms the employer 'may by unilateral action determine'."
>
> *Jones & Laughlin Steel Corp.* v. *National Labor Relations Board*, 301 U. S. 1, 45.

If it is not unlawful under the Act for an employer to refuse a closed shop or a signed agreement with a union, or for employees to accede to that view, certainly the mere expression in a contract of the parties' position in that regard cannot stamp that contract as illegal.

The Circuit Court's Opinion on the Contracts:

The Circuit Court did not follow the Board's interpretation of the contracts. We gather from its opinion (R. 911) that the contracts were deemed unlawful for two reasons which may be summarized as follows:

(1) That the stipulation of the employees and the Committee (R. 854) not to propose changing to a closed shop or to demand a signed contract with any Union is unlawful for the reason that "the right to propose the change is secured by statute as part of the right to negotiate" (R. 911).

(2) The right of a discharged employee to submit to the employer facts indicating that his discharge was unreasonable (R. 855) "suggests that the company union shall not act for him" (R. 911).

These objections are patently erroneous. The right of a discharged employee to submit to the employer facts indicating that his discharge was unreasonable is expressly secured by Section 9(a) of the Act which provides that any *individual employee* or group of employees shall have the right at any time to present grievances to their employer. See also, *National Labor Relations Board* v. *Union Pacific Stages* (C. C. A. 9th), 99 Fed. (2nd) 153, 164.

The other objection is equally without merit. It is true that under the statute employees, through their chosen representatives, have the right to bargain collectively, or, as the Court below said, have the "right to negotiate". But the right to negotiate is meaningless and futile unless considered as a means to an end, namely, the consummation of an

agreement. *Consolidated Edison Co.* v. *Labor Board*, 305 U. S. 197, 236. And such agreements must, by their inherent nature, definitely settle and fix the respective rights, duties and obligations of the parties with that degree of finality which is the underlying reason for entering into contractual relationships. To the extent that employees agree with their employer, they say in effect: "We will negotiate no further on this, since it is settled for the duration of our agreement", and such arrangements, allaying disputes and harmonizing labor relationships, are encouraged rather than precluded by the policy of the Act. *Consolidated Edison Company* v. *Labor Board*, 305 U. S. 197, 236, 237.

The Contracts Were Not Void Because of the Circumstances Attending Their Inception:

The Board claims also that the contracts are invalid, not only by reason of their terms, but because they were the outcome of negotiations with a labor organization, found by it to be dominated by the company as well as because of coercion and intimidation practiced upon employees.

Aside from the fact, as will be shown later, that the Committee was not dominated by petitioner but was a free organization, the Board in its zeal overlooks the legal effect of an individual contract. Company control of a bargaining agent, if it exists, cannot annihilate the vested rights acquired under a contract by the principals of the agent, who in this case are the employees. There is no presumption that the signature of an employee is meaningless and without legal effect, or that he did not, by signing, make the contract his contract in every sense, thus ratifying and confirming all that was negotiated by his agent.

As to "coercion" or "intimidation", this was simply an unwarranted assumption, unsupported by any evidence, no less substantial evidence. We re-print in the footnote below the portion of the testimony of Carmela Tesora, a Board's witness, containing the sole evidence of "coercion" on which the Board relies (R. 374-376)*.

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*"Q. Before you signed this paper, was there any conversation had between you and Mr. Sandford about it? A. No, Mr. Sandford said the contracts were here. It was up to us what we wanted to do, and he walked out.

Q. Who was in the room? A. Just the shop committee, and the rest of the girls.

Q. In other words, the shop committee was in the room when you and Mr. Sandford talked? A. Yes.

Q. Was there any other conversations had between you and any of the shop committee after Mr. Sandford went out of the room? A. Yes, there was, but I didn't pay any attention to it. I was talking to some of them.

Q. Did they tell you what would happen if you didn't sign the paper? A. I don't get that.

Q. Didn't anyone say to you—that you—that if you didn't sign the paper that you would not be securing your job? A. No, not to me, they didn't tell that.

Q. Who did they tell it to? A. I don't know. You see, I wasn't bothering with any of them. I just read off my own.

Q. Well, didn't someone speak to Mr. Sandford as to what the effect would be if you didn't sign the contract?

Mr. Mann: I object to that. 'Didn't someone speak to Mr. Sandford?'

The Witness: He said that before. He said, that he would not protect our jobs and that we would not get that 5% if we didn't sign.

Q. (By Mr. Sklar.) Who said that? A. Mr. Sandford.

Mr. Sklar: That is all. You may inquire.

Cross examination:

Q. (By Mr. Mann.) Did you sign that paper, Miss Tesora? A. Yes.

Q. What day? A. The day we went in, September 20th.

Q. I am now talking about you personally. Did anybody force you to sign the paper? A. No.

Frank J. Garone, on cross examination, testified (R. 765, 766):

"Q. You signed a contract, did you not? A. Signed a contract?

Q. Yes. A. Yes, sir, I did.

Q. Nobody forced you to sign that contract? A. Nobody forced me.

Q. You signed it voluntarily, of your own free

(Footnote continued from preceding page.)

Q. Did anybody threaten that anything would happen if you didn't sign the paper? A. That my job wasn't protected.

Q. Who said that? A. Mr. Sandford.

Q. In other words, that you would not get the 5% increase? A. Yes.

Q. You knew that paper—you knew what that paper was, didn't you? A. Yes.

Q. It was a contract? A. Yes.

Q. You signed it? A. Yes.

Q. Mr. Sandford signed it? A. Yes.

Q. On behalf of the company? A. Yes.

Q. Was there any other signatures on it? A. Shop committee's.

Q. Do you know the names of those people? A. Bertha Rossman, Jenny Marolla, Louis Moscola, Bill McCann and some girl, I don't know—she is a new girl—I don't know her name. I know only her first name; her name is Anna.

Trial Examiner Korey: Anna Dunn?

The Witness: No, it is not Anna Dunn, one of the new help.

Q. (By Mr. Mann.) Did you read that paper, Board's Exhibit 10 for Identification, carefully, before you signed it?

Trial Examiner Korey: He means this contract—this paper here (indicating).

The Witness: Yes.

Q. (By Mr. Mann.) You read that before you signed it? A. Certainly.

Q. You read English well? A. Yes.

Q. You understood everything that was in there? A. Yes, of course I did.

Q. You signed it voluntarily? A. Yes, I did.

Q. Nobody forced you to sign it? A. No."

will? A. The rest of them signed it, I guess it was, you know what I mean, I guess you had to sign it, something, everybody else signed it, and I supposed I had to sign, myself.

Q. Nobody forced you to do it? A. Nobody forced me."

Aparf from the numerous other reasons in this case precluding the Board from disrupting the contracts, elementary principles of justice and orderly procedure require that as a prerequisite to the enforcement of the drastic penalty imposed by the Board, each and every person who claims to have been coereed must appear, request rescission, tender back the benefits received and give evidence of a kind that would impel a court of equity to act.

There was not even an attempt to meet these fundamental conditions. Practically all the employees remained in ignorance of the entire proceeding. Not a single member of the Committee testified. Both Tesora and Garone, the only employees who testified in regard to the contract, stated that they signed voluntarily and without coercion (R. 376, 380, 381, 765, 766). *There is not a word in the record of the circumstances surrounding the execution of the contracts by the remainder of the employees*, except that the Committee distributed the contracts for signature (R. 587-589). Tesora's remark about "job protection" relied on by the Board as evidence of pressure by petitioner, was later explained by her as meaning that she would not receive the 5% increase in wages provided for in the contract unless she became a signatory thereto (R. 375 at fol. 1125).

Where, then, is the *substantial evidence* that is required to support the Board's finding of coercion? *Washington, Virginia & Maryland Coach Co.* v.

National Labor Relations Board, 301 U. S. 142, 147; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 229; *Appalachian Electric Power Co.* v. *National Labor Relations Board*, 93 F. (2d) 985, 989; *National Labor Relations Board* v. *Columbian Enameling & Stamping Co., Inc.*, 306 U. S. 292, 300.

The Relation of the Contracts to the Policy of the Act:

It is clear, we believe, that the particular objections to the contract made by both the Board and the Court below cannot survive the test of legal analysis. There remains for consideration the question whether any of the terms of these contracts violate the policy of the Act. We quote a few well-established principles controlling this phase of the argument.

> "The authorities all agree that a contract is not void as against public policy unless it is injurious to the interests of the public, or contravenes some established interest of society."
>
> *Hartford Fire Ins. Co.* v. *Chicago M. & St. P. R. Co.*, 20 Sup. Ct. 33, 175 U. S. 91, 106, 44 L. Ed. 84.

> "It must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and the usual and most important function of courts of justice is to maintain and enforce contracts, than to enable parties thereto to escape from their obligation on the pretext of 'public policy', unless it clearly appear that they contravene public right or the public welfare."
>
> *Baltimore & O. S. W. R. Co.* v. *Voight*, 20 Sup. Ct. 385, 387, 176 U. S. 498, 505, 44 L. Ed. 560.

The public policy of a nation or state must be determined by its Constitution, laws and judicial decisions, not by the varying opinion of laymen, lawyers or judges as to the demands or interests of the public.

Southern Ry. Co. v. *Blunt & Ward*, 155 Fed. 496, 497;

U. S. v. *Trans-Missouri Freight Ass'n*, 58 Fed. 69, 7 C. C. A. 15, 24 L. R. A. 73;

Swann v. *Swann*, 21 Fed. 299;

Hartford Fire Ins. Co. v. *Chicago, M. & St. P. Ry. Co.*, 70 Fed. 201, 17 C. C. A. 62, 30 L. R. A. 193; s. c., Sup. Co. 33, 175 U. S. 91, 44 L. Ed. 84.

Tested by these principles, we submit that the contract in this case, far from being in contravention of the interests of the public or of the policy of the Act, is a praiseworthy embodiment of those objectives which the Act was designed to secure, namely, the consummation, through collective bargaining, of an agreement stabilizing wage rates and working conditions—thus eliminating a chronic source of industrial strife and unrest.

"Moreover, the fundamental purpose of the Act is to protect interstate and foreign commerce from interruptions and obstructions caused by industrial strife. This purpose appears to be served by these contracts in an important degree. Representing such a large percentage of the employees of the companies, and precluding strikes and providing for the arbitration of disputes, these agreements are highly protective to interstate and foreign commerce. They contain no terms which can be said to 'affect commerce' in the sense of the Act so as to justify their abro-

gation by the Board. The disruption of these contracts, even pending proceedings to ascertain by an election the wishes of the majority of employees, would remove that salutary protection during the intervening period."

Consolidated Edison v. National Labor Relations Board, 305 U. S. 197, 237.

It is further maintained by the Board that under these contracts the employees have "lost" or been "deprived" of certain rights guaranteed them by Section 7 of the Act.* Disregarding the suggestion of coercion carried by these terms—for we have demonstrated that there was no coercion—we cannot pass unchallenged the unsound reasoning implicit in these declarations, namely, that an employee may not, if he chooses to do so, waive his rights under Section 7. The proposition is really academic because the employees here did not give up a single right or benefit granted by that section.

It is elementary that a person may waive a rule of law or a statute, or even a constitutional provision enacted for his benefit or protection, where no considerations of public policy are involved. *Sentenis v. Ladew*, 140 N. Y. 463, 466; 67 Corpus Juris 307, sec. 8. Since Section 7 is permissive and not mandatory, obviously, it is no different and no holier in relation to public policy than the thousands of other laws designed by Congress and State legislatures to afford certain protection or benefits to certain persons or classes of persons, which may, nevertheless,

* Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

be waived by those sought to be benefitted without offending public policy.

The policy and provisions of the New York State Labor Relations Act* are in substance precisely the same as the national policy and the National Labor Relations Act (see dissenting opinion of Mr. Justice Butler in *Consolidated Edison Co.* v. *Labor Board*, 305 U. S. 197, 239). Construing the State Act, the New York Labor Relations Board held:

> "While it endows workers with complete freedom to exercise the right of self-organization and to designate representatives for the purposes of collective bargaining, if they desire to do so, it is an obvious corollary that the Act likewise endows workers with equally complete freedom to refrain from self-organization and to declare that such is the desire or preference of the majority. The Act enunciates a right. It does not impose an obligation."
>
> *In re Hotel St. George Corporation and Hotel Residence Club Workers Industrial Union of Brooklyn, Local 28, Case No. SE 3353, Oct. 10, 1939.*

Therefore, even if we indulge in the assumption that under the terms of these contracts the employees did waive or relinquish some right or benefit conferred by Section 7, such action is not unlawful and supplies no warrant for the Board's interference.

The Concession of the Attorneys Respecting the Contracts:

At the hearing, while a witness was being cross examined, the following colloquy (R. 380-381) took place

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* Laws of 1937, Chapter 443, effective July 1, 1937; Article 20 of the Labor Law.

between Mr. Sklar, attorney for the Union, Mr. Graham, attorney for the Board, Mr. Mann, attorney for the company, and the Trial Examiner:

> "Mr. Sklar: Objected to, Mr. Examiner, on the ground that THIS CHARGE APPLIED TO AUGUST 2ND AND HAS NOTHING TO DO WITH THE CONTRACT OF SEPTEMBER 20TH.
>
> Mr. Mann: It talks about individual contracts, and they offered in evidence a contract.
>
> Mr. Sklar: Those contracts referred to are the ones mentioned by Mr. Sanford on July 29th.
>
> Mr. Graham: IN ORDER TO GET THE RIGHT EFFECT, WE ARE GOING TO LET THESE IN. COMPLAINT EMBODIES NONE OF THESE CONTRACTS.
>
> Mr. Mann: May I ask on the record whether they want to go into this question of contracts under their amended charge. If not, let's forget about it.
>
> (482) Trial Examiner Korey: I have ruled you can ask the question. Please continue."

The contract of September 20th referred to by Mr. Sklar appears in the record as Board's Exhibit 10 (R. 851-857) (admitted R. 385), and is a facsimile of the many contracts executed during the period from September 10, 1937 to September 20, 1937.

It is to be noted that Mr. Sklar's statement that the charge of August 2nd has nothing to do with the contract of September 20th coincides in effect with petitioner's claim outlined in Point I of this brief that the Board lacked jurisdiction, on the basis of charge sworn to on August 2, 1937, to adjudicate with respect to either the Committee or the contracts.

While, possibly, the statements quoted do not assume the stature of a formal stipulation, they are

at least concessions that the contracts were not in issue, and the Board was bound to honor and not repudiate them. *Morgan* v. *U. S.*, 304 U. S. 1, 22.

> "'In the trial of a cause, the admissions of counsel, as to matters to be proved, are constantly received and acted upon. They may dispense with proof of facts for which witnesses would otherwise be called. They may limit the demand made or the set-off claimed. Indeed, any fact bearing upon the issues involved, admitted by counsel, may be the ground of the Court's procedure, equally as if established by the clearest proof.'"
>
> *Oscanyan* v. *Winchester Repeating Arms Co.*, 103 U. S. 261, 263.

See also:

> *Shanley, et al.* v. *Bowers* (C. C. A. 2nd), 81 Fed. (2nd) 13, 16.

However, the Board, in its decision, ignored the concession of the attorneys and has consistently sought to avoid the consequences thereof. The opinion of the Circuit Court made no mention of the concession or its effect, although the point was strongly urged by petitioner in the proceedings below.

The Objection of Lack of Notice to Employees Was Seasonably Urged By Petitioner Before the Board. Petitioner May Raise the Point Since the Board's Defective Procedure Causes a Direct Injury to Petitioner.

In opposition to certiorari, the Board stated that the petitioner's contentions relative to lack of notice and hearing are not available now because they were not raised until the case reached the Circuit Court

and Section 10(e) of the Act provides that no objection that has not been urged before the Board, its member, agent or agency, shall be considered by the Court.

Petitioner sharply disputes this statement. At the conclusion of the hearing, petitioner's counsel submitted a memorandum to the Trial Examiner, an agent of the Board, in which the following appeared:

At page 39:

> "Of the 132 employees who signed Board's Exhibit 10, not one has appeared and asked that his contract be cancelled."

At page 41:

> "The rule is well established that if a party is necessary or indispensable, it must be cited as a party. Omission of an indispensable party is a jurisdictional defect.
>
> *Camp* v. *Gress*, 250 U. S. 308;
> *Caldwell* v. *Taggart*, 4 Pet. 190, 202;
> *Gregory* v. *Stetson*, 130 U. S. 570;
> *Shields* v. *Barrell*, 17 How. 129."

In the statement of exceptions to the Trial Examiner's Intermediate Report, petitioner stated (R. 835):

> "In this connection, it should be noted that not one employee of all those who signed these contracts was produced by the Board to testify that either he or she was coerced into signing it, or that he or she was desirous of having such contract cancelled."

In the same document petitioner excepted to the Trial Examiner's recommendations for cancellation

of the contracts on the ground "that said recommendations are contrary to law, and not supported by the evidence adduced upon the hearing" (R. 835).

The foregoing excerpts show plainly that the Board was seasonably apprised of the nature of petitioner's objection; hence Section 10(e) of the Act does not apply.

Likewise on certiorari, the Board claimed that since petitioner had itself received proper notice and hearing, it may not complain of the denial thereof to its employees.

The argument is untenable. Petitioner is not endeavoring to protect rights of other persons as to matters in which it has no legal interest. Compare *Virginia Railway Co.* v. *System Federation No. 40*, 300 U. S. 515, 558. On the contrary, upon enforcement of the order, the Board's original defective procedure causes such a substantial injury to petitioner in a legal sense that it has every right to raise the point.

What the Board struck down were contracts involving mutual rights and liabilities; inseparable and indivisible. The nullification to be effective must apply with equal force upon all parties to it. *Shields* v. *Barrow*, 17 How. 130, 140, 141; *Mallow* v. *Hinde*, 12 Wheat. 193, 198. Were the employees bound by the Board's order of cancellation? Clearly not. Necessary and indispensable parties can be bound by no decree to which they are not parties. *Barney* v. *Baltimore*, 73 U. S. 825, 6 Wall. 280, 285.

So that the fantastic, anomalous result of the Board's order is that petitioner is forbidden to exercise any rights under contracts which yet remain

in full force and effect in favor of the other parties thereto. Petitioner, under penalty of punishment for contempt, must cancel said contracts, but upon so doing is rendered vulnerable to employees and the Committee in a multiplicity of suits for damages for the breach thereof, or for specific performance or other rights of action. Is there any doubt then that petitioner is vitally and adversely affected by the non-joinder of the other parties, and may protest on that ground, not for the benefit of such others, but as a party thereby aggrieved in its own right?

Furthermore, the absence of indispensable parties resulted in a failure of jurisdiction on the part of the Board (*Employers Reinsurance Corp.* v. *Bryant*, 299 U. S. 374, 381; *Mallow* v. *Hinde*, 12 Wheat. 193, 198; *Shields* v. *Barrow*, 17 How. 130, 141; *Barney* v. *Baltimore*, 6 Wall. 280, 73 U. S. 825), and the point can be considered by the Court, *sua sponte*, even if not raised by the pleadings or suggested by counsel. *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199, 235.

POINT III.

There was no substantial evidence to sustain the Board's order dis-establishing the Committee; it was error for the Circuit Court to order petitioner to bargain with the Union following an election.

The Court below found that the evidence of domination was "somewhat inconclusive. The strike had failed and it might well be that the men were 'fed up' with the old union; a genuine company union was at least a possible outcome" (R. 911). Nevertheless, and despite its doubts, the Court sustained the Board and disestablished the Committee. Petitioner sub-

mits that "somewhat inconclusive" evidence of domination, far from attaining the requisite standard of substantiality, was in fact no evidence whatever, and the Circuit Court should have so found.

The fundamental purpose of Section 8(2) of the Act, providing that it shall be an unfair labor practice for an employer to dominate or interfere with the formation or administration of any labor organization, is to prevent the employer from sitting at both sides of the bargaining table, thereby reducing the process of collective bargaining to a sham and a mockery. Congress believed that only so long as labor organizations remained free of control by the employer could they effectively perform their functions as bargaining representatives.

This being so, an inquiry into the manner in which the Committee discharged its office of bargaining agent would furnish persuasive, if not conclusive, evidence on the question as to whether it was dominated by the company, or not. Was it a mere puppet in the hands of petitioner during the bargaining negotiations on September 10, 1937 as the Board contends, or did it deal at arms length with the intention and purpose of securing every possible advantage for the employees?

The answer is found in these conspicuous facts:

1. The Committee, while bargaining, sought to exact from petitioner the utmost in benefits for employees (R. 581, 582, 584, 697, 706-710).

2. The outcome of the collective bargaining was a written contract (R. 850-857) effective until July 10, 1940 (R. 857).

3. The contract required petitioner to grant a 5% increase in wages (R. 852), an 8 hour day and a 5 day week (R. 852), time and one-quarter to

specified classes of employees for overtime (R. 853) and a one week vacation with pay (R. 853). Petitioner, until July 10, 1938, was deprived of the right to reduce wages below the wage scale established in the contract (R. 855), and forfeited the right, even after such date, to make any unilateral adjustment in wages, hours, vacations and working facilities since, unless the Committee approved, the disputed items must be submitted to arbitration. Conversely, the Committee could propose changes in these matters, which if not agreed upon, were to be submitted to an arbitrator whose decision would be final and binding on all parties (R. 855, 856).

Convincing proof of the integrity and independence of the Committee may alone be found in the wresting of these important concessions and benefits from petitioner; a circumstance whose striking significance overwhelms those trifling incidents and innuendoes relied on by the Board as evidence of domination.

But the burden rested on the Board to prove a violation of Section 8(2), not on petitioner to disprove it, and the Board's attempt to do so can only be described as pathetic. We have previously narrated those facts which culminated in the signing of the petition (R. 866*a*) by the employees, said petition having been admitted into evidence without objection (R. 575). That petition, dated September 9, 1937, and signed by 118 out of about 140 employees, is clear and specific. It notified the management of the election of a committee of eight persons as the employees' representatives for collective bargaining, and that the authority vested in that committee "supersedes any authority that any of the undersigned may have given to any other group, organization or individual, and that no one except the collective bargaining committee consisting of our fellow work-

ers is authorized to represent us in collective bargaining".

Upon the execution of this document on September 9, 1937, the Bakery and Confectionery Workers International Union lost its status as exclusive bargaining agent and in its place the Committee became empowered to bargain collectively with petitioner on behalf of the employees. Section 9(a) of the National Labor Relations Act.

The Board, however, refused to take the petition seriously, or, apparently, to believe it possible that employees would voluntarily sever their connection with the Union, even though the Union's benefactions to the employees thus far had consisted in the carrying on of a strike and in compelling them to march on picket lines for over three weeks (R. 526) without payment of strike benefits (R. 129). But notwithstanding the suspicions with which the Board may regard this document, its findings are not conclusive unless supported by substantial evidence. *Washington, Virginia & Maryland Coach Co.* v. *Labor Board*, 301 U. S. 142, 147; *Consolidated Edison Co.* v. *Labor Board*, 305 U. S. 197, 229. Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," *Consolidated Edison Co. of New York* v. *National Labor Relations Board, supra*, and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. *Labor Board* v. *Columbian Enameling & Stamping Co., Inc.*, 306 U. S. 292, 300.

Prima facie, the petition ousted the Union from its

role as bargaining agent, with the Committee supplanting the Union, and the burden of proving otherwise rested on the Board. *National Labor Relations Board* v. *A. S. Abell Co.*, 97 Fed. (2nd) 951, 957 (C. C. A. 4th).

A like situation in which employees circulated a petition and organized a committee to represent them in dealings with their employer was presented in *National Labor Relations Board* v. *A. S. Abell Co.*, 97 Fed. (2nd) 951, 957 (C. C. A. 4th). The Court held:

> "There is, however, no justification for the position that spontaneous action on the part of the men is so improbable as to warrant the inference that it was inspired by the management."

If the Board suspected that the Committee was dominated by petitioner, or that the latter had a hand in its formation, the logical witnesses to prove these facts, if such facts existed, would naturally be those persons who composed the Committee as well as some of the 118 employees who signed the petition. Yet, the indisputable fact remains that not one of such persons was called or gave any testimony at the hearing, and there is not a shred of evidence in the record which indicated, at the hearing, that the validity of the petition as an expression of the workers' choice was ever assailed or impeached in the slightest degree. The proof was all the other way, since it was not denied that the first impulse for the formation of the Committee came from employees who were "fed up" with the Union (R. 526); that petitioner refused to deal with them unless a majority of the employees signified their assent; and that when petitioner's president dictated the form of the petition, he did so at the request of the employees (R. 576). Compare,

Railway Clerks Case, 281 U. S. 548, 560; *Labor Board v. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261.

In the case of *National Labor Relations Board* v. *Lion Shoe Company*, 97 Fed. (2nd) 448 (C. C. A. 1st), the situation was quite similar to the one at bar. Employees had approached the management and asked if it would deal with them if they formed "an independent, legitimate labor union with representatives of all departments in the factory represented." After a conference, contracts were typed in the office of the employer. The Court held, at page 454:

> "The fact that it was finally typed in the office of the respondent is also suggested in the Board's decision as evidence of domination by the respondent, which discloses the limits to which the Examiner and the Board went in drawing conclusions of domination. Obviously no weight could possibly be properly given to these facts as showing domination."

and at page 458:

> "* * * there would appear to be nothing in the Act that prevents an employer from entering into an agreement with a labor organization formed of old employees, on whatever terms may be agreed upon, no unfair labor practice being used or domination shown."

In *Ballston Still-Water Co. Inc. v. National Labor Relations Board*, 98 Fed. (2nd) 758, 762 (C. C. A. 2nd), the Court held:

> "A union limited to the employees of a single employer is as legal as any other, and we know of no rule or law that forbids the employer to permit his employees to solicit membership during working hours, provided he does not withhold a

like privilege from the opposition and exerts no pressure upon employees to join the union."

The Board, in its decision, ordered petitioner to bargain with Bakery and Confectionery Workers International Union (R. 895, 896), thereby giving no heed or effect to the employees' views, as evidenced by the petition. The Circuit Court, however, did not go so far. It ordered an election to determine whether the Union is still the representative of the majority of the employees (R. 912, 915, 916), but in so doing it likewise gave no effect to the petition. The authenticity of that petition could only be impugned by substantial evidence (not by trivialities such as typing in petitioner's office) before it could be arbitrarily disregarded. In the absence of such substantial evidence the Board and the Court below were bound, for judicial purposes, to give effect to this uncontroverted written exhibit according to its terms (*Chesapeake & Ohio R. R. Co.* v. *Martin*, 283 U. S. 209; *Lamer* v. *Mecker*, 25 N. Y. 361), and the failure so to do was error.

CONCLUSION.

The decree of the Circuit Court of Appeals for the Second Circuit granting enforcement of the order of the Board should be reversed in all respects; and the findings, conclusions, decision and order of the Board should be in all respects annulled and set aside.

Respectfully submitted.

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Appendix.

Applicable Provisions of the National Labor Relations Act

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

"Sec. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to Section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

"Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of col-

lective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

"SEC. 10.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling."

Applicable Provisions of the Rules and Regulations of the Board, Series 1, as Amended and Effective April 27th, 1936 (1 L. R. R. Manual 814)

"ARTICLE II.

"Procedure Under Section 10 of the Act for the Prevention of Unfair Labor Practices

Charge

"Section 1. A charge that any person has engaged in or is engaging in any unfair labor practice affecting commerce may be made by any person or labor organization. A charge may be withdrawn only with the consent of the Regional Director with whom such charge was filed or of the Board. Upon withdrawal of any charge, the Regional Director shall dismiss any complaint based thereon.

"Sec. 2. Except as provided in Section 37 of this Article, such charge shall be filed with the Regional Director for the Region in which the alleged unfair labor practice has occurred or is occurring. A charge alleging that an unfair labor practice has occurred or is occurring in two or more Regions may be filed with the Regional Director for any of such Regions.

"Sec. 3. Such charge shall be in writing, the original being signed and sworn to before any notary public or any agent of the Board authorized to administer oaths or acknowledgments. Three additional copies of such charge shall be filed. A blank form for making a charge will be supplied by the Regional Director upon request.

"Sec. 4. Such charge shall contain the following:

(a) The full name and address of the person or labor organization making the charge.

(b) The full name and address of the person against whom the charge is made (hereinafter referred to as the 'respondent').

(c) A clear and concise statement of the facts constituting the alleged unfair labor practice affecting commerce, particularly stating the names of the individuals involved and the time and place of occurrence.

"Sec. 5. After a charge has been filed, if it appears to the Regional Director that a proceeding in respect thereto should be instituted, he shall issue and cause to be served upon the respondent and the person or labor organization making the charge (hereinafter referred to as the 'parties to the proceeding') a formal complaint in the name of the Board stating the charges and containing a notice of hearing before a Trial Examiner at a place therein fixed and at a time not less than five days after the service of the complaint. A copy of the charge shall be attached to the complaint.

"Sec. 9. If, after the charge has been filed, the Regional Director declines to issue and cause to be served a complaint, the person or labor organization making the charge may obtain a review of such action by filing a request therefor with the Board in Washington, D. C., and filing a copy of such request with the Regional Director.

"Sec. 37. Whenever the Board deems it necessary in order to effectuate the purposes of the Act, it may permit a charge to be filed with it, in Washington,

D. C., or may, at any time after a charge has been filed with a Regional Director pursuant to Section 2 of this Article, order that such charge, and any proceedings which may have been instituted in respect thereto—

(a) be transferred to and continued before it, for the purpose of consolidation with any proceeding which may have been instituted by the Board, or for any other purpose; or

(b) be consolidated for the purpose of hearing, or for any other purpose, with any other proceeding which may have been instituted in the same region; or

(c) be transferred to and continued in any other Region, for the purpose of consolidation with any proceeding which may have been instituted in or transferred to such other Region, or for any other purpose.

The provisions of Sections 3 to 31, inclusive, of this Article shall, in so far as applicable, apply to proceedings before the Board pursuant to this Section, and the powers granted to Regional Directors in such provisions shall, for the purpose of this Section, be reserved to and exercised by the Board. After the transfer of any charge and any proceeding which may have been instituted in respect thereto from one Region to another pursuant to this Section, the provisions of Sections 3 to 36, inclusive, of this Article, shall apply to such charge and such proceeding as if the charge had originally been filed in the Region to which the transfer is made."